# Gentali (M) Sdn Bhd v Kawasaki Sunrock Sdn Bhd (No 3)

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-575 OF 1995
KAMALANATHAN RATNAM JC
18 JULY 1997

***Contract*** *— Appointment of sole distributor — Plaintiff appointed sole distributor of two types of defendant's products via two letters of appointment — Whether the two letters constituted separate contracts between the parties — Whether terms of contract subsisting between the parties were to be confined only to the two letters of appointment — Whether the two letters were merely part of the evidence in relation to the commercial relationship between the parties — Whether the letters were exhaustive of the terms of the contract — Whether defendant entitled to terminate plaintiff's sole distributorship status due to the latter's breach of the terms of the appointment*

***Contract*** *— Terms — Implied term — Sole distributorship agreement — Plaintiff appointed as sole distributor of defendant's products — Plaintiff marketed rival brand — Whether it could be implied that plaintiff could not have been distributor for rival whilst still sole distributor for defendant — Whether court may imply correlative obligation*

The plaintiff was appointed as the sole distributor of Kawasaki Completely Built Up ('CBU') motor cycles and spare parts in Malaysia by the defendant via a letter dated 1 January 1991 ('the sole distributorship agreement'). By a separate letter dated 1 January 1991 ('the jetski agreement'), the defendant also appointed the plaintiff as the sole distributor of Kawasaki Jetski watercraft and spare parts in Malaysia. By a letter dated 13 March 1992, the defendant proposed to tie-up the sole distributorship of CBU motor cycles with that of Kawasaki watercraft. The said letter stated that the offer of the new business scheme was subject to the plaintiff's acceptance. It was the case of the plaintiff that such a new proposed business scheme was in fact never agreed to by the plaintiff and that both the parties had proceeded on the basis that the plaintiff remained as the sole distributor under the sole distributorship agreement.

In August 1994, the defendant discovered that the plaintiff was dealing in watercraft of another brand, Seadoo. The plaintiff indicated that it wanted to market Seadoo watercraft instead of Kawasaki watercraft whilst maintaining the CBU products. The defendant terminated the plaintiff's sole distributorship of the motor cycles and the watercraft on 5 November 1994. The plaintiff contended that: (i) the defendant, in breach of the the sole distributorship agreement, had appointed others as distributors of the products. It was argued that it was an express and/or implied term of the sole distributorship agreement that the defendant would not appoint any other person, save and except the plaintiff, to act as distributor for the products; (ii) the letters of 1 January 1991 constituted two separate and independent agreements. Therefore, it was argued that it could hardly be reasonable to imply a term that the plaintiff would not deal in other brands of similar products so as to include watercraft in the letter of appointment for CBU motor cycles, when there were two

separate appointments, one for CBU motor cycles and the other for watercraft; and (iii) the defendant had unlawfully terminated the plaintiff's sole distributorship of CBU motorcyles. The plaintiff claimed for the expenses it had incurred in 1991 and loss of profits for ten years based on its profit for the year 1993. A

The defendant contended that: (i) it was an express and/or implied term of the plaintiff's appointment as dealer of the products that the plaintiff would not deal in other brands of similar products; and (ii) it had, at no time, terminated the plaintiff as a dealer but that the plaintiff had not placed any order for the CBU products after May 1995. As a result, the defendant had been compelled to market the CBU products itself by selling the products to any willing purchaser. The defendant counterclaimed for loss of profits as a result of the plaintiff's breach in selling a rival brand of products and its refusal to sell the defendant's product. B C

**Held**, dismissing the plaintiff's claim and allowing the defendant's counterclaim: D

(1) Whether there was one contract subsisting between the plaintiff and the defendant in respect of the two types of products involved the question whether the terms of the contract subsisting between the parties were to be confined only to the two letters of appointment, or whether the two letters were merely part of the evidence in relation to the commercial relationship between the parties. E

Upon examination of the facts and circumstances, there was in fact only one contract between the parties and that the two letters did not constitute separate contracts between them. It was obvious that the parties never expected to confine the terms and conditions of such a major and important dealership to merely the clauses in the letters. These two letters were merely evidence of the contract. The contract that was in place was for the plaintiff to be the defendant's sole distributor, initially for CBU motorcyles, and subsequently for the jetski watercraft. What the defendant was trying to initiate was to discuss a new business scheme, not a new contract altogether. F G

Since there was only one contract, the defendant was quite right to have terminated the plaintiff's sole distributorship status. It would be inconceivable that either party would have allowed a situation to exist whereby the other breaches the exclusivity of one product line and the innocent party would still be obliged to maintain the other (see pp 419I, 420A, F, 421C–E and 425A, G). H

(2) The facts of the case concluded that there was in existence an express agreement on the part of the plaintiff not to deal in rival brands. In any case, even if there was no such express term, such a term should be implied. The implication of a term into a contract depends on the presumed intention of the parties. This intention may be collected from the express words of the contract and the surrounding circumstances, or from the nature of the legal relationship into which the parties have entered. The I

condition that the plaintiff could not have been an agent or distributor for Seadoo whilst it was still a sole distributor for the defendant could be readily implied as it had to be a necessary term if the plaintiff was to enjoy being a sole distributor and to allow the distribution of the products smoothly and effectively (see pp 422C–H and 423G–H).

(3) Where a contract imposes an obligation on one party to the contract but is silent as to the obligations of the other party, the court may in appropriate circumstances imply a correlative obligation on the other party. Therefore, if there was an obligation on the defendant not to appoint another distributor, then likewise, if the plaintiff was to be regarded as the 'sole distributor', then it should only distribute Kawasaki branded CBU motor cycles and watercraft and not a rival brand. It was a question of loyalty and commercial morality. Further, the plaintiff did not inform the defendant that it had obtained the Seadoo distribution. The plaintiff was, therefore, clearly in breach of the obligation to be reasonably honest and truthful with the defendant (see pp 423I and 424A–B, G–H).

(4) The plaintiff was not entitled to recoup its expenses incurred in 1991 from the defendant as there was no evidence that these expenses were attributable to the defendant or to the alleged breach. These expenses were monies that the plaintiff would have been required to expend in any event for the running of its business before any profit could be counted. Furthermore, there was no arrangement in existence whereby the defendant had agreed to subsidize or indemnify the plaintiff in respect of its expenses.

The plaintiff was also not entitled to claim for loss of profits for a ten-year period based on profits for 1993. 1993 was deliberately chosen because it was in this year that the plaintiff achieved the highest profits. An award for loss of profits should put the plaintiff in the same position as if the breach had not occurred. Merely because the plaintiff speculated that the market would be lucrative for the next ten years did not mean that it would suffer loss of profits for the next ten years. Further, when the plaintiff's sole distributorship was terminated, the plaintiff was not prevented by the defendant from selling the Kawasaki products. Instead, the defendant merely opened up the market to other dealers in view of the plaintiff's breach. It was the plaintiff who chose not to place orders with the defendant because the defendant opened up the market to other dealers (see pp 425I and 426A–B, D–H).

(5) Through the evidence of DW2, the deputy general manager of the defendant, the defendant managed to establish a loss of its sales after the plaintiff had breached the distribution agreement. Since DW2's evidence on this loss was not challenged in cross-examination by the plaintiff, the evidence was accepted and the defendant's counterclaim was allowed (see pp 427I and 428A–C).

[**Bahasa Malaysia summary**

Plaintif telah dilantik sebagai pengedar tunggal motosikal dan alat ganti Kawasaki Completely Built Up ('CBU') di Malaysia oleh defendan melalui sepucuk surat bertarikh 1 Januari 1991 ('perjanjian pengedaran tunggal'). Menerusi sepucuk surat berasingan bertarikh 1 Januari 1991 ('perjanjian jetski'), defendan juga telah melantik plaintif sebagai pengedar tunggal lancang air dan alat ganti Kawasaki Jetski di Malaysia. Melalui sepucuk surat bertarikh 13 Mac 1992, defendan bercadang untuk menyelaraskan pengedaran tunggal motosikal CBU dengan pengedaran lancang air Kawasaki. Surat tersebut menyatakan bahawa tawaran tentang skim perniagaan baru adalah tertakluk kepada penerimaan plaintif. Ia merupakan kes plaintif bahawa skim perniagaan yang dicadangkan demikian pada hakikatnya tidak pernah dipersetujui oleh plaintif dan bahawa kedua-dua pihak telah menerus atas dasar bahawa plaintif kekal sebagai pengedar tunggal di bawah perjanjian pengedaran tunggal tersebut.

Pada Ogos 1994, defendan mendapat tahu bahawa plaintif berniaga dalam lancang air jenama lain, iaitu Seadoo. Plaintif membayangkan bahawa ia ingin memasarkan lancang air Seadoo dan bukan lancang air Kawasaki sementara mengekalkan keluaran CBU. Defendan menamatkan pengedaran tunggal motosikal dan lancang air oleh plaintif pada 5 November 1994. Plaintif menghujahkan bahawa: (i) defendan, bertentangan dengan perjanjian pengedaran tunggal, telah melantik orang lain sebagai pengedar keluaran. Adalah dihujahkan bahawa ianya merupakan suatu terma nyata dan/atau tersirat perjanjian pengedaran tunggal bahawa defendan tidak akan melantik sesiapa yang lain, kecuali plaintif, untuk bertindak sebagai pengedar untuk keluaran itu; (ii) surat-surat bertarikh 1 Januari 1991 membentuk dua perjanjian yang berasingan dan bebas. Maka, ia dihujahkan bahawa adalah tidak munasabah untuk menyirat terma bahawa plaintif tidak akan berniaga dalam jenama lain keluaran yang serupa bagi termasuk lancang air dalam surat pelantikan untuk motosikal CBU, sedangkan terdapat dua pelantikan berasingan, satu untuk motosikal CBU dan yang satu lagi untuk lancang air; dan (iii) defendan dengan tidak sahnya menamatkan pengedaran tunggal plaintif untuk motosikal CBU. Plaintif menuntut perbelanjaan yang ditanggung pada tahun 1991 dan kehilangan keuntungan untuk sepuluh tahun berdasarkan keuntungannya untuk tahun 1993.

Defendan menghujahkan bahawa: (i) ia merupakan satu terma nyata dan/atau tersirat pelantikan plaintif sebagai pengedar keluaran itu bahawa plaintif tidak akan berniaga dalam jenama lain barangan yang serupa; dan (ii) ia tidak pada bila-bila masa memberhentikan plaintif sebagai pengedar tetapi plaintif tidak membuat apa-apa tempahan untuk keluaran CBU selepas bulan Mei 1995. Akibatnya, defendan terpaksa memasarkan keluaran CBU sendiri dengan menjualkan keluaran kepada mana-mana pembeli yang sanggup. Defendan membuat tuntutan balas untuk kerugian akibat kemungkiran plaintif dalam menjual keluaran jenama yang bersaingan dan keengganannya untuk menjual keluaran defendan.

**Diputuskan**, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Sama ada terdapat satu kontrak yang wujud di antara plaintif dan defendan berhubung dengan dua jenis keluaran melibatkan persoalan sama ada terma kontrak yang wujud di antara pihak-pihak harus dihadkan kepada dua surat pelantikan itu sahaja, atau sama ada kedua-dua surat itu hanya sebahagian daripada keterangan berkaitan dengan perhubungan perdagangan di antara pihak-pihak.

Selepas meneliti fakta-fakta dan keadaan, memang terdapat satu kontrak sahaja di antara pihak-pihak dan bahawa kedua-dua surat itu tidak membentuk kontrak berasingan di antara mereka. Adalah jelas bahawa pihak-pihak tidak menjangka untuk menghadkan terma dan syarat pengedaran yang begitu penting kepada fasal dalam surat-surat itu sahaja. Kedua-dua surat itu hanyalah bukti atas kontrak. Kontrak yang wujud adalah untuk plaintif menjadi pengedar tunggal defendan, pada mulanya untuk motosikal CBU, dan berikutnya untuk lancang air jetski. Apa yang cuba dimulakan oleh defendan adalah untuk membincangkan satu skim perniagaan yang baru, dan bukannya kontrak baru sama sekali.

Oleh kerana terdapat satu kontrak sahaja, defendan adalah betul dalam memberhentikan taraf pengedaran tunggal plaintif. Tidak dapat dibayangkan bahawa mana-mana satu pihak akan membenarkan keadaan wujud di mana satu pihak melanggar sifat eksklusif satu keluaran dan pihak yang ikhlas masih wajib mengekalkan yang satu lagi (lihat ms 419I, 420A, F, 421C–E dan 425A, G).

(2) Fakta-fakta kes menyimpulkan bahawa wujudnya suatu perjanjian nyata pada pihak plaintif supaya tidak berniaga dalam jenama bersaingan. Walau bagaimanapun, sekalipun tidak terdapat terma nyata sedemikian, terma begitu haruslah tersirat. Implikasi suatu terma ke dalam kontrak bergantung kepada anggapan hasrat pihak-pihak. Hasrat ini boleh dikumpulkan daripada perkataan-perkataan nyata kontrak dan keadaan sekeliling, atau pun daripada ciri perhubungan sah yang mengikat pihak-pihak. Syarat bahawa plaintif tidak mungkin adalah ejen atau pengedar untuk Seadoo sedangkan ia masih pengedar tunggal untuk defendan mudah dibayangkan kerana ia haruslah menjadi terma asas sekiranya plaintif ingin menjadi pengedar tunggal dan untuk membenarkan pengedaran keluaran secara lancar dan berkesan (lihat ms 422C–H dan 423G–H).

(3) Di mana suatu kontrak mengenakan kewajipan pada suatu pihak kepada kontrak tetapi tidak menyebut tentang kewajipan pihak yang satu lagi, dalam keadaan yang sesuai mahkamah boleh membayangkan suatu kewajipan yang korelatif pada pihak yang satu lagi. Oleh yang demikian, sekiranya terdapat kewajipan atas defendan untuk tidak melantik pengedar yang lain, maka begitu juga, andainya plaintif hendaklah dianggap sebagai 'pengedar

tunggal', ia patut mengedar motosikal CBU dan lancang air jenama Kawasaki sahaja dan bukan jenama yang bersaingan. Ia merupakan persoalan kesetiaan dan norma kesusilaan perdagangan. Seterusnya, plaintif tidak memberitahu defendan bahawa ia telah memperolehi pengedaran Seadoo. Oleh itu, plaintif jelas telah melanggar kewajipan untuk bertindak secara jujur dan berterus terang secara munasabah dengan defendan (lihat ms 423I dan 424A–B, G–H).

(4) Plaintif tidak berhak mendapat balik perbelanjaan yang ditanggung pada tahun 1991 daripada defendan kerana tiada bukti bahawa perbelanjaan ini boleh dianggap berpunca daripada defendan atau kepada kemungkiran yang dikatakan. Perbelanjaan-perbelanjaan ini adalah wang yang perlu dibelanjakan oleh plaintif dalam keadaan apa pun bagi menjalankan perniagaannya sebelum apa-apa keuntungan boleh dikira. Tambahan pula, tiada rancangan yang wujud di mana defendan telah bersetuju memberi subsidi kepada atau menanggung rugi plaintif berhubung dengan perbelanjaannya.

Plaintif juga tidak berhak menuntut kehilangan keuntungan untuk tempoh sepuluh tahun berdasarkan keuntungan untuk tahun 1993. Tahun 1993 dengan sengajanya dipilih kerana dalam tahun inilah plaintif mencapai keuntungan yang tertinggi. Suatu award untuk kerugian harus meletak plaintif dalam kedudukan yang sama bagaikan kemungkiran tidak berlaku. Hanya kerana plaintif mengagak bahawa pasaran adalah lumayan untuk sepuluh tahun yang berikut tidak bermakna bahawa ia akan mengalami kerugian untuk sepuluh tahun yang berikut. Seterusnya, apabila pengedaran tunggal plaintif ditamatkan, plaintif tidak dihalang oleh defendan daripada menjual keluaran Kawasaki. Sebaliknya defendan cuma membuka pasaran kepada peniaga lain memandangkan kemungkiran plaintif. Plaintif yang telah memilih supaya tidak membuat tempahan dengan defendan kerana defendan telah membuka pasaran kepada peniaga yang lain (lihat ms 425I dan 426A–B, D–H).

(5) Menerusi keterangan DW2, timbalan pengurus am defendan, defendan berjaya membuktikan kehilangan jualan selepas plaintif memungkir perjanjian pengedaran tersebut. Oleh kerana keterangan DW2 atas kerugian ini tidak dicabar di pemeriksaan balas oleh plaintif, keterangan diterima dan tuntutan balas defendan dibenarkan (lihat ms 427I dan 428A–C).]

## Notes

For a case on appointment of sole distributor, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1564.

For cases on implied terms, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3037–3063.

## Cases referred to

*Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 (refd)

*Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 (refd)
*Gentali (M) Sdn Bhd lwn Kawasaki Sunrock Sdn Bhd* [1996] 3 MLJ 597 (refd)
*Gentali (M) Sdn Bhd v Kawasaki Sunrock Sdn Bhd* [1996] 4 CLJ 813 (refd)
*Liverpool City Council v Irwin & Anor* [1977] AC 239 (refd)
*Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 (refd)
*Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799 (refd)
*Pasuma Pharmacal Corp v McAlister & Co Ltd* [1965] 1 MLJ 221 (refd)
*Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (refd)
*Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220 (refd)
*Wong Swee Chin v PP* [1981] 1 MLJ 212 (refd)

**Legislation referred to**

Evidence Act 1950 s 92

*YK Yong* (*SK Yap & Sharizal*) for the plaintiff.
*Robert Lazar* (*Shanti Mogan* with him) (*Shearn Delamore & Co*) for the defendant.

*Cur Adv Vult*

**Kamalanathan Ratnam JC:**

*Facts*

By a letter dated 1 January 1991 ('the sole distributorship agreement'), the defendant appointed the plaintiff as the sole distributor of Kawasaki Completely Built Up ('CBU') motor cycles and spare parts in Malaysia. By the said letter, the appointment of the plaintiff as the sole distributor was, to quote the last paragraph of the said letter, 'valid for one year up to 31 December 1991 and will be renewed continuously under the above condition'. By a separate letter dated 1 January 1991 ('the jetski agreement'), the defendant appointed the plaintiff as the sole distributor of Kawasaki Jetski watercraft and spare parts in Malaysia.

The history of the relationship between the parties can be traced back to August 1988 before the formation of the plaintiff. At that time, one Belee Chung (PW1) was with a company known as Gentali Industry Sdn Bhd which was retailing both Kawasaki Completely Knocked Down ('CKD') and CBU models. PW1 then started Belroy Corp Sdn Bhd ('Belroy Corp'). Belroy Corp was appointed as the sole dealer for the Kawasaki CBU models. Belroy Corp then went into a joint venture with MWE Bhd and a company then known as Pelangi Ria Sdn Bhd was started. Pelangi Ria Sdn Bhd was then appointed as the sole dealer for the Kawasaki CBU models. It then changed its name to MWE Gentali Sdn Bhd and subsequently to that of the plaintiff's. I had set out the above facts

briefly in *Gentali (M) Sdn Bhd v Kawasaki Sunrock Sdn Bhd* [1996] 4 CLJ 813 wherein the plaintiff appealed before me against the order of the learned senior assistant registrar setting aside the judgment in default of defence obtained against the defendant. I had dismissed the plaintiff's appeal and the appeal by the plaintiff against my decision was dismissed by the Court of Appeal: see *Gentali (M) Sdn Bhd lwn Kawasaki Sunrock Sdn Bhd* [1996] 3 MLJ 597.

*The plaintiff's claim*

It was the plaintiff's case that it was an express and/or implied term of the sole distributorship agreement that the defendant would not appoint any other person save and except the plaintiff, to act as distributor of the products. The plaintiff also pleaded that pursuant to the said agreement, it had incurred expenses in 1991 totalling RM219,339, particulars of which were set out. The plaintiff contended that notwithstanding the said agreement, the defendant, in breach thereof, appointed others as distributors of the products. The plaintiff thus claimed the sum of RM6,127,779 made up as follows:

PARTICULARS

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| (i) | Start-up and other initial costs | RM 219,339 |
| (ii) | Loss of profits based on the profits ascertained for the year commencing 1 January 1993 to 31 December 1993 with a multiplier of ten years | RM5,908,440 |
| | | RM6,127,779 |

*The plaintiff's case*

The plaintiff's case was that after the two letters of appointment dated 1 January 1991, more than a year later, the defendant, by its letter dated 13 March 1992 (CABD 1 p 2) had proposed a so-called new business scheme to the plaintiff. The defendant now sought to tie-up the sole distributorship of CBU motor cycles with the sole distributorship of Kawasaki watercraft. It was submitted that by this letter, the defendant now sought to fix the duration of the sole distributorship. The plaintiff also took umbrage at the said letter which states that the offer of the new business scheme was subject to the plaintiff's acceptance thereof and would be effective after the parties affix their 'mutual signatures on the agreement sheet'. It was the case of the plaintiff that such a new proposed business scheme was in fact never agreed to by the plaintiff and that both the parties had proceeded on the basis that the plaintiff remained as the sole distributor under the sole distributorship agreement. It was pointed out that there was no correspondence from the defendant to say that the plaintiff ceased to be the sole distributor for Kawasaki CBU motor cycles in 1992 and 1993. In 1994, the sole distributorship of CBU motor cycles and the sole distributorship of Kawasaki watercraft were still in force until

A they were terminated by the defendant by its letter dated 5 November 1994 (CABD 1 p 51). There was no letter of complaint by the defendant to the plaintiff that the latter had been distributing other brands of motor cycles. PW1 had said that the plaintiff had not dealt with any other brands of motor cycles between 1991 to 1994, but merely dealt with another brand of motorcycle known as Aprilia which was launched only in March B 1996. It is the contention of the plaintiff that the sole distributorship of CBU motor cycles and the sole distributorship of Kawasaki watercraft are two independent and separate agreements. On the other hand, the defendant contends that there is an implied term that the plaintiff would not deal in other brands of similar products or in any way deal in goods produced and C marketed by the defendant's rivals or competitors.

The plaintiff submitted that DW1 had said in evidence that sometime in 1990, the defendant was thinking of bringing in the Kawasaki Jetski watercraft into Malaysia. Later in his evidence, DW1 had said that sometime at the end of 1990, the defendant decided to appoint the plaintiff to D market Kawasaki watercraft. Yet, it was submitted, when issuing a letter of appointment for sole distributorship, the defendant chose to issue the letter of appointment dated 1 January 1991 for sole distributorship of CBU motor cycles separately, when it could have incorporated in the sole distributorship of CBU motor cycles, the sole distributorship of Kawasaki watercraft as well, since by the end of 1990, the defendant had already E decided to appoint the plaintiff to market Kawasaki watercraft. It was urged upon me that in those circumstances, it could hardly be reasonable to imply a term that 'the plaintiff would not deal in other brands of similar products or in any way deal in goods produced and marketed by the defendant's rivals and competitors' so as to include watercraft in the letter F of appointment for CBU motor cycles, when there are two separate appointments, one for CBU motor cycles and the other for watercraft. It was submitted that it was inequitable if such a suggested term be implied so as, on hindsight, to enable the defendant to terminate the sole distributorship of CBU motor cycles as well, even though the plaintiff had not been guilty of dealing in other brands of motor cycles and even though G the plaintiff had endeavoured to have gained a market share in the distributorship of CBU motor cycles. Business efficacy of the sole distributorship of Kawasaki watercraft is well served without implying the terms suggested by the defendant. It was pointed out that since both the letters were dated 1 January 1991 and as the defendant had at the end of H 1990 decided to appoint the plaintiff to market Kawasaki watercraft, there would have been no need for two separate letters of appointment. It would have been perfectly sufficient to merely have one letter of appointment incorporating both the CBU and watercraft distributorships. It was submitted that the suggested implied term is also not capable of clear expression in that it is capable of including watercraft and even Kawasaki I CKD motor cycles in the letter of appointment of CBU motor cycles, and thereby contradicting the unequivocal express provision therein which is confined to the distributorship of CBU motor cycles, and when there is already a separate letter of appointment for Kawasaki watercraft. It was

urged upon me to therefore hold that the implied term suggested by the defendant is untenable. A

The plaintiff also submitted that the defendant had unlawfully terminated the plaintiff's sole distributorship of CBU motor cycles.

*The defendants's case* B

The defendant's case was that whilst it had predominantly dealt with the plaintiff in respect of the sale of the CBU products, it also sold the CBU products to other parties. The reference to the plaintiff as sole dealer was because the defendant was then dealing predominantly with the plaintiff. It was the defendant's contention that it was an express and/or implied C term of the plaintiff's appointment as dealer of the products that the plaintiff would not deal in other brands of similar products or in any way deal in goods produced and marketed by the defendant's rivals and competitors. At the request of the plaintiff sometime in 1990/1991 to bring in the Kawasaki watercraft into the Malaysian market, the defendant began to market the Kawasaki watercraft into West Malaysia through the D plaintiff. It is the contention of the defendant that by dealing in and marketing the Kawasaki watercraft, it was an express and/or implied term of the plaintiff's appointment as dealer of the products that the plaintiff would not deal in other brands of similar products. Sometime in August 1994, the defendant came to know that the plaintiff was dealing in watercraft E products of another company, namely Bombardier Incorporated, who were the suppliers of Seadoo, another brand of watercraft. This, it was submitted, was in breach of the express and/or implied term of the plaintiff's dealership that it would not deal in competitive products. When the defendant raised the issue of the Seadoo watercraft with the plaintiff, the plaintiff indicated that it did not want to deal in the Kawasaki watercraft F and instead wanted to market the Seadoo watercraft whilst maintaining the CBU products. This was not acceptable to the defendant as it meant that the plaintiff would not dedicate its efforts solely to market the defendant's products. This in fact happened as the plaintiff's orders for the Kawasaki CBU motor cycles greatly decreased in 1994. The defendant G contended that for the year 1994, the plaintiff placed orders for a number of CBU products, and under the terms of the agreement between the plaintiff and the defendant, the plaintiff was obliged to take delivery of these CBU products and make payment thereof. In breach of the obligations, the plaintiff failed to do so. It is the defendant's case that it had, at no time, terminated the plaintiff as a dealer but that the plaintiff had not placed any H order for the CBU products after May 1995. As a result of the plaintiff's failure to take delivery of orders placed with the defendant, the defendant had been compelled to market the CBU products itself by selling the said products to any willing purchaser in order to realize its holding stocks.

Alternatively, it is the defendant's case that if the plaintiff was I appointed sole distributor for the defendant in West Malaysia, which of course it does not agree, then under the dealership, the plaintiff was not permitted to deal in competitive products. However, in breach thereof, the

A plaintiff had dealt in the Seadoo watercraft for Bombardier Incorporated, which is in direct competition to the defendant's Jetski watercraft.

In the circumstances, the defendant counterclaimed for loss and damage and loss of profits resulting from the plaintiff's breach of the dealership agreement and its refusal to sell the defendant's products.

B

*The court's findings*

Appropriate to my deciding on the issues raised by the parties, it is pertinent to consider the nature of the relationship between the parties.

C *The nature of the relationship*

Considering both the letters of appointment, I find that except for the product line, the terms contained in both are identical in that the plaintiff is described in both the letters as the 'sole distributor' and that the product is to be distributed 'smoothly and effectively' and that all payments 'shall D be executed timely and perfectly' and that sales and stock condition shall be reported to the defendant 'timely and correctly'.

As for the operations previously, the plaintiff would place the orders with the defendant who would transmit it to Nisso Iwai Corp of Japan ('NIC'), the manufacturer. The plaintiff would make payment directly to NIC. The defendant would bring in the items and deliver them to the E plaintiff who would then sell to the public. The plaintiff would then pay the defendant a commission for all bikes sold to them.

Subsequently this procedure was changed. The defendant would place the orders with NIC, in consultation with the plaintiff. The defendant would then bring in the items and deliver them to the plaintiff upon F request. The plaintiff would then pay the defendant for the bikes it takes delivery of.

I accept the submission of the defence that the plaintiff was an agent of the defendant. This seems obvious because of the right of the defendant particularly to call for an account as stated in the letters of appointment. G In *Bowstead and Reynolds on Agency* (16th Ed, 1996) the learned authors, in dealing with the question of distributors, concessionaires or franchisees, and in distinguishing an agent from a re-seller, says this at p 28:

> Each transaction must be examined on its facts, considering the extent to which an agent's duties are appropriate. Much turns on the extent to which H the principal can call for an account, for the duty to account is a typical feature of the agent's position (*Michelin Tyre Co Ltd v McFarlane (Glasgow) Ltd* (1917) 55 Sc L Rep 35; art 52). The ways in which the parties describe themselves are not conclusive.

*Was there one contract in respect of two types of products?*

I The next primary issue to be considered is whether there was one contract subsisting between the plaintiff and the defendant which was in respect of the two types of products. Any analysis of this issue will firstly involve the

question whether the terms of the contract subsisting between the plaintiff and the defendant are to be confined only to the two letters of appointment, or whether the two letters are merely part of the evidence, in relation to the commercial relationship between the parties.

*Phipson on Evidence* (14th Ed 1990, para 37–22) states:

> Where a contract, not required by law to be in writing, purports to be contained in a document which the court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at the time of executing the document, if it be not inconsistent with the documentary terms.

And again at para 35–24:

> When a transaction is contained in several documents, parol evidence is admissible to connect them and show what papers were intended to constitute the transaction.

In fact, in *Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220, the Federal Court held that the prohibition against admissibility of evidence under s 92 of the Evidence Act 1950 only applies where all, as opposed to some only, of the terms of the contract are written into the agreement. Thus, where some terms are given orally and some in writing, oral evidence can be given to prove the terms agreed to orally. The court further held that where the oral representations are in conflict with the printed condition in the written contract, the representations must be given an overriding effect and the printed condition must therefore be rejected.

Upon examination of the facts and circumstances, it is my finding that there was in fact only one contract between the parties and that the two letters do not constitute separate contracts between them. In the first place, the letters are not exhaustive of the terms of the contract between the parties in that the plaintiff was already distributing Kawasaki CBU motorbikes even before the letter of appointment dated 1 January 1991. Further, even the company owned by PW1, Belroy Corp, which was distributing Kawasaki CBU motorbikes before the plaintiff, did not have any written agreement with the defendant. The letter of 1 January 1991 does not mention many salient features, for instance, who places the orders, who does the imports, when is payment to be effected and the rate of the overriding commission, etc. It is not difficult that the letter of 1 January 1991 only contains the framework of the relationship. Except for the product line, the two letters use identical language. This, to my mind, negates the possibility of the letters containing exhaustively the terms of the contract, and that there were two contracts in existence. I find that the letter of 1 January 1991 was indeed written for a different reason altogether. I accept the evidence of DW1 who said that the letter was written in order to accommodate Belee Chung's desire for such a letter that would see him in good stead in the event of any corporate differences that he had or may have with his joint venture partner. That is why the letter has a very unusual clause (cl 1):

A Mr Belee Chung Boon Hai will remain as the managing director and shareholder of MWE Gentali Sdn Bhd.

I find that the letter of appointment for the CBU motor cycles was written merely to confirm the appointment. It is also relevant to note that the letter of appointment in respect of the Jetski watercraft is dated 1 January 1991 B when it was actually written well after that. Clause 4 of the Jetski letter refers to 'motorcycle cost'. This clearly shows that this letter was merely copied from the other letter and in the heading the words CBU was substituted with Jetski watercraft.

It is obvious to me that the parties never expected to confine the C terms and conditions of such a major and important dealership to merely five clauses of a one-page letter. It is my judgment that these two letters were not intended to contain all the terms of the contract between the parties. They are merely evidence of the contract. It is my finding that the contract that was in place was for the plaintiff to be the defendant's sole distributor, initially for CBU motor cycles, and subsequently for the Jetski D watercraft. That product line was added when it became available. That is why, when the parties were trying to re-negotiate the terms of the arrangement between themselves, they were addressing each other on the scheme for both product lines. It is not whether they agreed to the proposed changes. The point is they discussed both product lines together because, as I found, there was only one contract in place. If there were two E contracts surely they would have discussed them separately. It is my finding that what the defendant was trying to initiate was to discuss a new business scheme, not a new contract altogether.

In answer to the plaintiff's submission as to why the defendant should issue a separate letter in relation to CBU motor cycles when at that F time the defendant had already decided to award the watercraft business to the plaintiff, the defendant replied that it had not at that time, started to bring in the watercraft nor market it. Further, DW1 only issued the letter to the plaintiff at PW1's (Belee Chung's) request, and for a purpose, that is, to bolster PW1's position in MWE Gentali.

G *Implied term*

The next issue I have to consider is whether there was an implied term that the defendant would not appoint another distributor and that the plaintiff will not sell a rival product.

H DW1, the general manager of the defendant testified that it was always a term of the plaintiff's appointment as dealer that it would deal solely with the defendant's products and would not promote or sell any other brands of similar products. I find that the evidence of DW1 on this was not at all challenged in cross-examination. It is trite law that failure to cross-examine a witness on a crucial part of the case will amount to an I acceptance of the witness's testimony (see *Wong Swee Chin v PP* [1981] 1 MLJ 212 at p 213). I do not accept PW1's testimony. My observation of him was that he was elusive and indulged in prevarication. His response under cross-examination was as follows:

Q: Did your agreement to deal in Seadoo prohibit you from dealing with competitors' brand? A

A: Can I refuse to answer this question as it is not relevant?

Court: You will have to answer.

A: I have to look through the agreement before I answer this question. I need to know what other brands mean. B

Q: I relate to brands dealing with personal watercrafts.

A: I have to look through the agreement.

I find that PW1's reluctance to answer the questions relating to whether the contract with Seadoo prevented the plaintiff from dealing in rival brands suggests that there was such a clause to that effect. It is evident C from the testimony of DW1 which was not challenged in cross-examination and from the evasive response of PW1 that there was in existence an express agreement on the part of the plaintiff not to deal in rival brands.

In any case, even if there was no such express term it is my judgment that such a term should be implied for the following reasons: D

(a) Although there may be a presumption of not implying terms into a written contract, the question that arises is whether the two letters dated 1 January 1991 do constitute the whole of the entire contract. Even if they do, then based on the decision in *Liverpool City Council v Irwin & Anor* [1977] AC 239 at p 253, the court will hold that E where the bargain is obviously not complete, the court is reluctant to supply the missing terms. The court is ready, however, to imply a term into a document which on the face of it is complete on the ground that without it the contract will not work.

(b) The two letters are not bilateral documents in that the defendant had signed the letter which is addressed to the plaintiff. The plaintiff, however, has not even signed the letter. F

(c) Even the plaintiff is driven to implying the term that if it was appointed as 'sole distributor', then the defendant could not appoint another distributor. The plaintiff does so on the basis that the term 'sole distributorship' connotes its exclusive appointment. G

The implication of a term into a contract depends on the presumed intention of the parties. In some cases, that intention is collected from the express words of the contract and the surrounding circumstances. In others it is collected from the nature of the legal relationship into which the parties have entered. The first category of cases rely on the decision of H *Liverpool City Council* where Lord Cross of Chelsea said (at p 258):

> ... the court will naturally ask itself whether in the general run of cases the term in question would be one which it would be reasonable to insert.

Thus, in *Liverpool City Council*, the House of Lords decided that in a I landlord/tenant relationship, a term will be implied into the contract of tenancy of a flat in a high rise block that there is an obligation on the part of the landlord to take reasonable care to keep in repair and provide essential means of access and rubbish chutes.

A In dealing with the nature of legal relationship, Gopal Sri Ram JCA held, inter alia, in *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 that a court's power to imply a term in a contract forms part of its interpretative jurisdiction. He said at p 609:

> Fourth, an examination of the authorities shows that the law differentiates between two categories of cases — we will call them 'category I' and 'category II' — when determining whether a term ought to be implied in a contract, subject always to the qualification that there is absent a contrary intention. Such a contrary intention may, of course, take the form of an express stipulation in the contract. For it is a well-established principle of law that a term will not be implied if to do so would contradict some express provision in the contract or set at naught the main aim or object of the contract.

He continued (at p 609):

> Category I therefore comprises those relationships in which the court more readily implies a term in the contract unless there is evinced a contrary intention. The court acts in such cases with greater readiness to imply a term in order to make the particular relationship workable.

He held that contracts between a banker and his customer, between an employer and his employee, between a principal and his agent, between a vendor and purchaser of immovable property and between a landlord and his tenant fell within this category. It was also his Lordship's view that the test that is to be applied when implying a term in the relationship within category I is necessity. He also held that category II consists of cases not falling within category I, that is to say, where no special relationship such as those recognized by the law exists. The law is less ready to imply a term into a contract failing within category II. A higher standard or test is required to be satisfied before a court will act.

It will be noted that the relationship of principal and agent as exemplified in the case of *Pasuma Pharmacal Corp v McAlister & Co Ltd* [1965] 1 MLJ 221, is noted to be one in the category where in the words of Gopal Sri Ram JCA 'the court acts ... with greater readiness to imply a term to make the particular relationship workable'.

The condition that the plaintiff could not have been an agent or distributor for Seadoo whilst it was still a sole distributor for the defendant can be readily implied as it has to be a necessary term if the plaintiff was to enjoy being a sole distributor and also to allow the distribution of the products 'smoothly and effectively'. It was the same motivation that dictated the plaintiff to rightly complain about its sub-dealer, Ghee Hua in Sarawak, who was dealing with a rival brand. The terms as contained in exh D1 (letter dated 18 March 1991 from the plaintiff to the defendant) show how rightly indignant PW1 was about Ghee Hua being in breach of its obligations. Surely the plaintiff cannot approbate and reprobate on this fundamental issue. It is my judgment that where a contract imposes an obligation on one party to the contract, but is silent as to the obligations of the other party, the court may in appropriate circumstances imply a correlative obligation on the other party. Hence in the present case, if there

is an obligation on the defendant not to appoint another distributor, then likewise, if the plaintiff is to be regarded as 'sole' distributor, then it should only distribute Kawasaki branded CBU motor cycles and watercraft and not a rival brand. It is a question of loyalty and commercial morality. This was precisely the situation in *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799 where the defendant agreed to take the whole of his electric supply from the plaintiff which it was, by statute, obliged to supply. It was held that the defendant could not take his supply from another company and could be injuncted from so doing. Buckley J said at p 806:

> The language here is that the consumer agrees to take the whole of the electric energy required for his premises from A. The company was bound to supply under the statute if asked. The consumer asks. The result is that he thereupon had a right as against the plaintiffs to be supplied. The only question for bargain then was the price, which was fixed at 4½d. They were contracting, not affirmatively for the supply of something, but negatively that the defendant would not take from somebody else. There is no affirmative contract here to take anything at all. Ginder does not agree that he will take any energy from the plaintiffs. He says he will take the whole of the electric energy required. It is competent to him to burn gas if he likes, and require no energy. The only thing he was contracting to do was that if he took electric energy he would take from the plaintiffs. It seems to me the whole essence of that contract is that which is not expressed in words, I agree, but which by implication is really the only thing existing, a contract that he will not take from somebody else. He agrees to take the whole from A, which necessarily implies that he will not take from B. As matter of construction therefore, not by express words but by necessary implication, I think there is here an agreement not to take from others.

*The plaintiff in breach of obligation*

There can be no denying whatsoever that the plaintiff did during the currency of its appointment as a sole distributor with the defendant accept an appointment to distribute Seadoo watercraft which is a competitive rival to that of Kawasaki. Documentary evidence tendered showed the takeover by the plaintiff of 'Seadoo' stock from the former dealer, the meetings held between PW1, the principals behind 'Seadoo' and the former 'Seadoo' agent and the memorandum of understanding signed between the plaintiff and the former 'Seadoo' agent. It is a fact that when the plaintiff had obtained the 'Seadoo' distribution, it did not even inform the defendant. Clearly, the plaintiff was in breach of the obligation to be reasonably honest and truthful with the plaintiff. In *Pasuma Pharmacal Corp v McAlister & Co Ltd* [1965] 1 MLJ 221, Thompson LP said at p 226:

> In the circumstances it is difficult to resist the conclusion that there was an implied condition that in relation to their business as covered by the contract the parties should be reasonably honest and truthful with each other.

*The breach goes to the root of the contract*

Counsel for the plaintiff concedes that if the plaintiff was in breach of the 'Jetski contract' for dealing in a rival brand, then the defendant could terminate the contract, his contention being that 'CBU motorbikes' and

'Jetskis' are two different contracts. Since I have already found that there was only one contract, I have no hesitation in concluding that the defendant was quite right to have terminated the plaintiff's sole distributorship status. In *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, Gopal Sri Ram JCA said at p 681:

> Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.
>
> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.

His Lordship continued (at p 682):

> Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

It is inconceivable that either party would have agreed to allow a situation to exist whereby the other breaches the exclusivity of one product line and the innocent party is still obliged to maintain the other. For instance, if the defendant for one moment expressed the view that it wanted to give the CBU motorcycle distribution to someone else, would the plaintiff still stand idly by, or worse, could the defendant, in that situation say to the plaintiff that it must still be the sole distributor for Jetski watercraft but that the defendant could do what it liked with the CBU motorcycle distribution? That is what the plaintiff was trying to do to the defendant. In effect it was saying, we will do what we like on the watercraft product, that is, we will deal with the Seadoo products, but we are still entitled to be the sole CBU motorcycle distributor for the defendant.

*The plaintiff's failure to prove its losses*

(i) Claim for expenses

The plaintiff has made a claim for all expenses incurred in the year 1991. I find that in respect of this claim the plaintiff is not entitled to recoup its

expenses from the defendant as there is no evidence that these expenses were attributable to the defendant or to the alleged breach. These expenses are monies that the plaintiff would have been required to expend in any event for the running of its business before any profit could be counted. Furthermore, the plaintiff has not pointed to any arrangement in existence whereby the defendant had agreed to subsidize or indemnify the plaintiff in respect of its expenses. In fact, in *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569, the (then) Supreme Court held that in respect of the claim for marketing costs, the plaintiff was entitled to claim for such amount as it could prove to be clearly attributable to the first defendant's breach of the said agreement.

(ii) The plaintiff's claim for loss of profits

In addition, the plaintiff has made a claim for loss of profits for a ten-year period based on its profit for the year 1993. No reason has been offered as to why a period of ten years has been chosen by the plaintiff. Probably the ten-year period was chosen based on the evidence of PW1 who said that he foresaw that in at least the next ten years, the motorcycle industry would become more lucrative. An award for loss of profits, on the legal theory that an award of damages is meant to compensate an aggrieved party, means that the plaintiff should be placed, by an award of damages, in the same position as it would be if the breach had not occurred. Merely because PW1 speculates that the market will be lucrative for the next ten years does not mean that the plaintiff will suffer loss of profits for ten years. In any case, PW1's speculation did not seem to take into account his own admission when he said that the reason why the plaintiff's orders of the CBU motorbikes and the Jetskis were less than half in 1994 of what the plaintiff had ordered in 1993 was, 'because there was a downturn in the market'. It is my finding that the plaintiff had deliberately chosen 1993 as the basis for its calculation of lost profits because 1993 represented the year in which the plaintiff achieved the highest profits. In fact, whilst figures were given for the years 1991 to 1993, no figures were produced for 1994. I find that in the light of the evidence adduced, the year 1993 is not representative of the profits made by the plaintiff during the years from 1990–1994 and cannot be used as the basis for the plaintiff's claim for loss of profits.

I further find that when the plaintiff's sole distributorship was terminated, the plaintiff was not prevented by the defendant from selling the Kawasaki products. Instead, the defendant merely opened up the market to other dealers in view of the plaintiff's breach. It was the plaintiff who chose not to place orders with the defendant because the defendant opened up the market to other dealers.

The plaintiff admitted in evidence that it started selling 'Seadoo' watercraft and Aprilia bikes after its sole distributorship was terminated. However, the plaintiff failed or refused to adduce evidence of the profits from those sales nor has it established that it suffered a loss of profits after its distributorship was terminated. Instead the plaintiff has claimed its profits for a period of ten years based on the profit for the year 1993. This,

I rule, the plaintiff is not entitled to do. In *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, Edgar Joseph Jr J (as he then was) said at p 367:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

His Lordship continued (at p 367):

> On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at p 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one-man business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given.

In the case before me, the evidence led to prove the alleged losses was the plaintiff's accounts for the years 1992 to 1993 and the oral evidence of PW2. Under cross-examination, PW2 confirmed that he did not prepare the accounts but that he merely audited it. In this context, the judgment of Edgar Joseph Jr J in the *Popular Industries* case at p 369 becomes all the more relevant. This is what his Lordship said (at p 369):

> I would go further and say that even had the accounts books been in evidence they could not by themselves have been sufficient to charge the defendants with liability having regard to the provisions of s 34 of the Evidence Act so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant and auditor Mr So, despite what he might say, was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts.

In view of the evidence tendered and based on the authorities referred to, it is my finding that the plaintiff has failed to prove its losses.

I therefore dismissed the claim with costs.

*The counterclaim*

The defendant had counterclaimed for loss of profits as a result of the plaintiff's breach in selling a rival brand of products. Through the evidence of DW2, the deputy general manager of the defendant, the defendant has

established a loss of its sales after the plaintiff had breached the distribution agreement. In essence, the figures relevant to the defendant's counterclaim are that the average of sales for the years 1992 and 1993 was:

(a) In respect of CBU big bikes — RM6,751,954 pa

(b) In respect of Jetski watercraft — RM1,010,394 pa

In 1995, the year for which the defendant is claiming, sales of CBU motorbikes were only 27 units as compared to the average 319 units sold. The loss for that year was RM6,180,472 as stated by DW2, being the loss of sale of 292 units. No Jetskis were sold in 1995 and the loss was RM1,010,394. The true loss to the defendant is a 5% profit margin on RM6,180,472 + RM1,010,394 which works out to RM359,542. Since DW2's evidence on this was not challenged in cross-examination, I accept the said evidence. I therefore allowed the counterclaim of RM359,542 with costs.

*Plaintiff's claim dismissed and defendant's counterclaim allowed*

Reported by Hanim Kamaruddin